United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 28, 2003

TO : Victoria E. Aguayo, Regional Director
William M. Pate, Jr., Regional Attorney
James A. Small, Assistant to the Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Taylor Frager
Case 21-CA-35568

512-5009
512-5012-8300
512-5072-0400
512-5096-1400
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This Section 8(a)(1) California access case was submitted for advice as to whether a general contractor unlawfully locked nonemployee Union business agents inside a construction jobsite and yelled at them in front of employees.

We agree with the Region that the charge should be dismissed, absent withdrawal, because California law did not privilege the business agents' presence on the private construction site. Further, the Employer's conduct would not restrain and coerce employees from exercising Section 7 rights.

FACTS

Taylor Frager (the "Employer") is the general contractor for a construction jobsite in San Diego, California. The project involves the construction of residential and commercial buildings.[1] HP Forming International, LTC ("HP") is a concrete subcontractor performing work on the project. Carpenters Local 547 (the "Union") does not represent the Employer's employees, HP's employees, or any other employees working at the project.

The project has a primary entrance for employees, which is about 30 feet in length. This entrance is locked by a chain link fence during non-business hours. The Employer limits access to employees working on the project whose employers (project subcontractors) have signed insurance

[1] The entire project was under construction during the relevant times of this case.

liability waivers. It does not permit anyone else onto the project.[2] The Employer has posted signs announcing the access rule on its jobsite trailer.

The Employer's field superintendent, Vincent Lawler, states that in November 2002 he met with a Union representative in the jobsite trailer. The Union representative raised concerns about HP working on the project, stating that HP did not pay or treat its workers fairly. The Union representative stated that if something was not worked out, there would be problems. Lawler states that he told the Union representative about the Employer's access rules, and that the Union would be denied access. Lawler also told the Union representative that the Union could talk to employees outside the project's entrance gate.

Beginning in about December 2002, Union business agents began coming to the project to talk with HP employees. At first, they checked in, but Lawler would deny them permission to enter, explaining that visitors are not allowed on the property for insurance liability reasons. Subsequently, the business agents simply entered the property without checking in, typically staying on the property for 15-20 minutes before leaving. Lawler would threaten to call and/or call the police if they did not leave. On one occasion, the police arrived and escorted a business agent off the property. However, the business agents typically left before the police arrived.

On about January 22, 2003,[3] three Union business agents entered the jobsite to speak with HP employees about area standard wages. The business agents allegedly did not check in because they knew Lawler would deny them access. Lawler confronted the business agents as they were speaking to HP employees, and yelled at them to leave the property. There is no evidence that he yelled about anything other than that the business agents were trespassing and must leave. The business agents did not leave, and Lawler returned to his trailer, where he called the police. When the business agents eventually headed toward the jobsite exit, Lawler stepped out of his trailer and locked the gate.[4] Lawler

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[2] The Employer states that it makes no exceptions to this rule, and there is no evidence to the contrary.

[3] All dates are in 2003 unless otherwise indicated.

[4] The business agents claim that they could not leave the site with the gate locked. The Employer claims that there were other exits. At the time, the business agents were unaware of any other unlocked exits.

told the business agents he was holding them until the police arrived. The business agents assert that Lawler kept the gate locked for about 20 minutes.[5] He then opened the gate based on a promise from the business agents that they would not leave until the police arrived. After Lawler opened the gate, the business agents waited for about ten minutes, but then stated they could not wait forever, and left.[6]

The Union's charge alleges that the Employer violated Section 8(a)(1) because Lawler falsely imprisoned and yelled at the three business agents in the presence of employees. Although the charge does not allege that the Employer has maintained an unlawful no-access policy, the Union contends that the business agents were lawfully on the property on the date in question.

ACTION

We agree with the Region that the charge should be dismissed, absent withdrawal. The Employer did not violate the Act by locking the business agents inside the jobsite while waiting for the police to arrive because under Lechmere, the business agents were not lawfully on the property, and thus were not engaged in protected activity, and the Employer's conduct did not tend to restrain and coerce the employee witnesses in the future exercise of their Section 7 rights.

In Lechmere, Inc. v. NLRB, the Supreme Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by non-employee organizers."[7] In order to assert a Lechmere privilege, an employer must have a sufficient property interest under the applicable state law to exclude others and make refusal to vacate the property at the employer's request a "trespass."[8] As relevant here,

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[5] Lawler claims it was only five minutes.

[6] There is no evidence that the police ever actually arrived or that the Employer filed trespass charges.

[7] 502 U.S. 527, 537 (1992). See also Leslie Homes, Inc., 316 NLRB 123, 127-28 (1995) (extending Lechmere rationale to nonemployee area standards activity), rev. denied 68 F.3d 71 (3d Cir. 1995).

[8] Bristol Farms, 311 NLRB 437, 438-39 (1993); Johnson & Hardin Co., 305 NLRB 690, 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

current California labor law and policy limits private property interests to exclude others.[9]

In Sears, the California Supreme Court held that under the Moscone Act (Cal. Code of Civ. Proc. §527.3), which prohibits injunctions against persons involved in peaceful picketing at "any place where any person or persons may lawfully be," the employer could not evict union pickets from the privately-owned sidewalk surrounding its store.[10] The court first found that, independent of any constitutional right, California could permit union activity on private property as a matter of state labor law.[11] It then interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions.[12] Because

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[9] Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980). In light of our conclusion regarding access assuming the continued viability of Sears, we need not address the D.C. Circuit's concerns with the Board's reliance on it in Winco Foods, Inc., 337 NLRB No. 41 (2001), question certified 333 F.3d 223 (2003).

California state constitutional freedom of speech guarantees also limit private property interests where the property is akin to a public forum. Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979) (solicitation at privately owned shopping center protected by state constitution), affd. 447 U.S. 74 (1980). Here, however, the California constitution clearly does not privilege the business agents' activities within the jobsite, as it is not open to the public. Golden Gateway Center v. Golden Gateway Tenants Assn., 111 Cal.Rptr.2d 336, 352 (2001) (large residential/retail center could lawfully bar tenants association from distributing newsletters under apartment doors, because, as a threshold matter, private property must be "freely and openly accessible to the public" to be a Pruneyard public forum).

[10] Sears, 158 Cal.Rptr. at 381.

[11] The court (158 Cal.Rptr. at 377 n.5) noted Robins v. Pruneyard, recently decided, and stated that:

> The Robins decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of the Code of Civil Procedure Section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

[12] Sears, 158 Cal.Rptr. at 375-76.

Schwartz-Torrance[13] and In re Lane[14] had established the legality of peaceful union picketing and handbilling on private sidewalks outside a store, the court concluded that the state legislature had now codified this rule into its labor statutes.[15] Thus, the court found that the California legislature had determined, as a matter of state labor law, that the rights of property owners to exclude others from the exterior areas surrounding business establishments must be subordinated to the rights of persons engaging in peaceful labor activities directed at those establishments.[16]

Regarding the scope of the Moscone Act, the Sears court noted that the phrase "any place where any person or persons may lawfully be" was undefined by the statute and that "a strict reading might appear to authorize picketing in the aisles of the Sears store or even in the private offices of its executives."[17] Although the court found it unnecessary to define the phrase in order to resolve the case before it, it suggested that reading the statute to privilege picketing of such interior spaces might excessively interfere with private property rights.[18]

We conclude that the business agents did not have a right of access under the Moscone Act to the gated "interior" of the construction jobsite. There is no California case privileging such access.[19] The jobsite was

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[13] Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, 40 Cal.Rptr. 233 (1964), cert. denied 380 U.S. 906 (1965) (reversing injunction of union picketing on privately owned sidewalk outside bakery involved in labor dispute).

[14] In re Lane, 79 Cal.Rptr. 729 (1969) (reversing trespass conviction of union representative who handbilled on private sidewalk outside supermarket involved in labor dispute).

[15] Sears, 158 Cal.Rptr. at 379.

[16] Id. at 378.

[17] Id. at 375.

[18] Ibid.

[19] We agree with the Region that the instant case is distinguishable from In re Catalano, 171 Cal.Rptr. 667, 676-677 (1981) (nonemployee union representatives who, in accord with a collective-bargaining agreement, conducted a safety

in no way open to public use as were the private sidewalks in Sears. Rather, it was gated and fenced, and access was explicitly limited to employees of subcontractors who had signed an insurance liability waiver. In these circumstances, the jobsite was similar to the interior spaces discussed in Sears. Accordingly, the business agents were not privileged to be on the property, and the Employer could lawfully eject them from the jobsite.[20]

Moreover, the Employer's conduct of yelling at and detaining the business agents in the presence of employees, while waiting for the police to arrive, did not violate Section 8(a)(1). We have found no Board decisions where an employer violated the Act by detaining – rather than merely ejecting – nonemployees engaged in unprotected conduct on its property.[21] On the other hand, the Board has found that violence or threats of violence committed against nonemployee union agents, in the presence of employees, violates 8(a)(1) even when the union agents are engaged in unprotected activity, in contexts where the employees reasonably could believe that the threat or attack was motivated by union animus and that a similar fate might befall them if they engaged in Section 7 activity.[22] Here,

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inspection and prepared a shop steward's report at a construction jobsite, were, on balance, covered by the "lawful union activity" exception to the criminal trespass statute).

[20] For a similar construction of Sears, see Blackhawk-Nunn, Schuler Homes, Nicholas Lane/Innovative Lane, Innovative Lane Systems, and Innovative Steel Systems, Cases 32-CA-17703-1, et al., Advice Memorandum dated May 19, 2000 (houses and lots on which construction was in progress, as well as designated construction area at other location, analogized to interior spaces discussed in Sears).

[21] Compare Villa Avila, 253 NLRB 76, 82, 83 (1980) (employer unlawfully blocked egress of nonemployee union agents lawfully on its property), enfd. 673 F.2d 281 (9th Cir. 1982) and Marshall Field & Co., 98 NLRB 88, 101-102, 104 (1952) (employer unlawfully arrested nonemployee union organizers inside retail store, pre-Babcock & Wilcox, as part of a policy of preventing such organizers from gaining access to its employees in any part of its store).

[22] Miron & Sons Laundry, 338 NLRB No. 2, slip op. at 9-10 (2002) (employer entitled to demand that nonemployee union representative leave its premises, but was not privileged to resort to threats of physical violence, in the presence of employees, to obtain that objective); Staffmate, Inc., Case 12-CA-21179, Advice Memorandum dated February 14, 2003

however, the Employer's conduct was not akin to "violence."[23] Even assuming it was, employees on the jobsite who witnessed the events would not reasonably believe that a similar fate might befall them were they to engage in Section 7 conduct. Thus, the Region found no evidence that Lawler's yelling involved any subject matter other than that the business agents were trespassing and must leave. Lawler did not mention, much less denigrate, the Union. In these circumstances, Lawler's conduct would not reasonably tend to interfere with, restrain, or coerce employee exercise of Section 7 rights any more than simply ejecting the business agents from the property.[24]

Finally, we need not decide whether the Employer's detention of business agents while awaiting the police – arguably a "citizen's arrest" under California law[25] – would trigger the intervention of governmental machinery so as to require a Bill Johnson's analysis.[26] In any event, there is

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(manager violated 8(a)(1) by punching union organizer in the mouth in the presence of two job applicants, who could reasonably conclude that the violence was motivated by the organizer's union status and that a similar fate might befall them if they engaged in Section 7 activity).

[23] Cf. New Life Bakery, 301 NLRB 421, 428 (1991) ("[f]ew actions have a more direct tendency to coerce employees in the exercise of their statutory rights than threats of physical harm and genuine acts of physical violence"), enfd. mem. 980 F.2d 738 (9th Cir. 1992).

[24] See Mid-State, Inc., 331 NLRB 1372, 1372 (2000) (no violation where threats of physical violence against union representative clearly emanated from personal dispute and employees were aware of reason for statements).

[25] See Cal. Penal Code §§ 834, 835, 837, 839, 841, 847.

[26] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983). In several recent Advice memorandums we have applied Johnson & Hardin Co., 305 NLRB at 691, and found that a "citizen's arrest" initiated as part of a filing of criminal charges should be analyzed under a Bill Johnson's standard. See S.D. Deacon Corp. of California, Case 32-CA-19543-1, et al., Advice Memorandum dated December 6, 2002; Hampton Inn of Stockton, Case 32-CA-19823-1, Advice Memorandum dated February 13, 2003; Cal-Tex Equities, LP and Pinkerton Security Services, Cases 20-CA-30190-1, et al., Advice Memorandum dated February 13, 2003.

no violation under Bill Johnson's, because there was no retaliation against protected activity.

B.J.K.